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IN THE

Supreme Court of the United States

October Term, 1963.

No. 481.

VIKING THEATRE CORPORATION,
Petitioner,

v.

PARAMOUNT FILM DISTRIBUTING CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit is reported at 320 F. 2d 285, and is reproduced in the Appendix to the Petition herein (1a-31a). The memorandum decision of the District Court is not reported but appears in the printed record in the Court of Appeals (R. 2349-52).

JURISDICTION.

The judgment sought to be reviewed was entered in the court below on June 21, 1963. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

1. Whether the operator of a first-run motion picture theatre has a right under the antitrust laws to recover treble damages from competing exhibitors and film distributors, because two of such exhibitors did not bid *against each other* for certain films, even though (1) plaintiff itself consistently licensed and exhibited those very films; (2) there is no evidence of any adverse impact upon plaintiff's business; and (3) all first-run exhibitors, including the plaintiff, had an equal opportunity to compete for every film offered.

2. Whether petitioner introduced any evidence from which a jury could have reasonably inferred either the fact or the amount of damage.

3. Where an exhibitor seeking treble damages under the antitrust laws was afforded the opportunity in ten weeks of trial to establish conspiratorial conduct through evidence of individual transactions respecting every one of the 87 pictures in which it evidenced an interest, did the trial judge abuse his discretionary power to curtail cumulative evidence in massive conspiracy trials by rejecting the exhibitor's offer to explore the intricate details of 381 additional transactions concerning pictures which the plaintiff never even attempted to license? In any event, was petitioner prejudiced by such evidentiary rulings when the Court of Appeals considered petitioner's offered proof as if admitted?

4. Where a private antitrust suit involving no substantial legal questions was determined on fact from a 7000-page trial record, and unanimously affirmed on fact, should this Court grant certiorari on petitioner's theory that to do so would lighten this Court's work load by encouraging other treble damage suits, thereby reducing the number of Government antitrust actions which come to this Court by direct appeal?

STATUTES INVOLVED.

The pertinent statutes are Section 1 of the Sherman Act, 26 Stat. 209, 15 U. S. C. § 1, Section 16 of the Clayton Act, 38 Stat. 737, 15 U. S. C. § 26, and Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. § 15, which latter section provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE.

The facts of this case are set forth in detail in the unanimous opinion of the Court of Appeals (1a-31a),* affirming the District Court's judgment, in directing a verdict for respondents, that petitioner had failed to establish any basis for recovery under the antitrust laws.

Petitioner, the operator of the Viking Theatre in Philadelphia, exhibited first-run motion pictures continuously throughout the 28-month period embraced by this suit (9a). In the highly competitive Philadelphia market, petitioner's theatre—one of *twelve* first-run theatres in that city (31a)—expressed an interest in licensing only 87 of the 468 first-run films offered by the motion picture distributors, actually sought only 75, and was awarded and exhibited 34 (9a-10a; R. 907). The respondents are seven distributors who supplied Viking with first-run pictures, and three of Viking's first-run competitors.

Viking's entry into Philadelphia's first-run market.

The Viking Theatre was operated by respondent Stanley Warner as the Aldine until 1953, when it was closed because its inferior location, appointments, and record of performance, in a market already plagued by a critical shortage of first-run films, made it unprofitable (9a; R. 94). Stanley Warner sold the shuttered theatre to Harry Sley (operator of a large chain of parking lots and garages in Philadelphia) who initially indicated the intention to convert the unsuccessful theatre into a parking garage (R. 104). Mr. Sley, however, decided to become a first-run exhibitor, and after some renovation work, reopened the old Aldine as the Viking Theatre on July 2, 1954 (9a). Neither

* References followed by "a" indicate the Court of Appeals' opinion in the Appendix to the Petition herein; the reference "R" indicates the page number of the printed record in the Court of Appeals.

Mr. Sley nor the management he installed in the Viking Theatre had any prior experience in first-run exhibition (R. 311; R. 1276; R. 1497).

The distribution of first-run films.

Since the business which this case involves—distributing and licensing first-run motion pictures in Philadelphia during the period 1954-1956—is thoroughly analyzed in the Court of Appeals' opinion (4a-9a), only a few salient facts need be emphasized here. Motion pictures were licensed to exhibitors through negotiation or by competitive bidding (6a-7a). Because each film played at only one first-run theatre, the distributor had to exercise its business judgment in selecting one of several competing theatres for each first-run award (4a-6a). The exhibitor had to estimate the grossing potential of various pictures made available by the distributors, select which pictures it would attempt to license, and decide what terms it could profitably offer. The distributor's evaluation of competing proposals involved appraisal of many interacting factors, including grossing potential of the competing theatres, and the varied terms offered by each, which often involved different formulas for computing the distributors' share of box-office receipts (6a-7a). The difference between success and failure, in both the exhibitor's decision in proposing an offer and the distributor's evaluation of the offer, necessarily turned upon their business judgments of an indeterminable factor: the box-office potential of the new picture. A film's earning power could be determined only *after* its exhibition, but competing offers for a film had to be made and evaluated *before* exhibition (4a-5a; 18a-19a). As Viking's manager conceded at the trial, he "certainly" made "whoppers of errors" in evaluating films before they had been tested at the box-office (R. 397). Errors of business judgment—deliberately passing up pictures which proved successful at competing theatres, and making un-

profitably high offers for films which failed—proved costly in first-run exhibition, as the Court of Appeals' analysis demonstrates.

Entering an industry beset by theatre failures and staggering from the impact of free television (R. 905-907), starved for product and with *twelve* first-run mouths to feed in the hotly competitive Philadelphia market (9a; R. 93), the Viking Theatre sought, successfully obtained and exhibited first-run films throughout the entire 28-month period with which this suit is concerned.

Viking's success in licensing first-run product.

Viking began its operations by quickly developing a close business relationship with one distributor, respondent Metro-Goldwyn-Mayer ("MGM"). Viking exhibited MGM pictures almost exclusively during its first year, showing only casual interest in the product of other distributors (10a). Opening its doors with an MGM film, Viking was awarded and played nine of the ten MGM films which it sought (10a).[1] A dispute over advertising expenses and the refusal of Viking to pay film rental terminated the cordial relationship (10a), and Viking turned to distributors which for a full year it had virtually ignored.

Again Viking had no difficulty in obtaining first-run product. Ignoring MGM, Viking began its second year of operations with United Artists' "NOT AS A STRANGER", one of the two best pictures distributed by United Artists during the entire period in suit. Seeking a total of 17 United Artists films, Viking was awarded 11 (10a).

Another distributor whose product interested Viking was Twentieth Century-Fox, which awarded Viking 8 of the 15 pictures for which it bid (11a). Viking sought fewer films from the remaining distributors (*e.g.*, it only attempted to license 3 of the 70 pictures offered by Columbia

1. The only MGM picture which Viking sought and lost was awarded to the non-defendant Arcadia Theatre (R. 379-80).

during the period, 11a), and was never denied the opportunity to compete for any first-run film released by any distributor in Philadelphia. By the end of the 28-month period in suit, Viking had licensed 37 and exhibited 34 first-run films; had been awarded films by each respondent distributor; and though competing with eleven other first-run theatres, was successful in licensing nearly half of the films it sought (9a-11a).

As to the *quality* of Viking's films (determined on the basis of "national film rental", a hindsight criterion reflecting the total rental a picture earns from nation-wide exhibition),[2] it *exceeded* that of films played at the Midtown Theatre, operated by respondent Goldman and concededly Philadelphia's first-run theatre most nearly comparable to the Viking (R. 894-5; R. 395-96).[3]

"Splits" of motion pictures in Philadelphia.

In motion picture parlance, the term "split" refers to an agreement between exhibitors to refrain from bidding or negotiating against each other for specified pictures of a distributor. Splits have been a common practice in the motion picture industry for many years (11a). Long before the Viking Theatre entered Philadelphia's first-run market, two of the respondent exhibitors—Goldman and Stanley Warner—had agreed to split certain pictures of some distributors. When films are split, the distributor makes no commitment—it is completely free to license any picture to any exhibitor. The split imposes no obligation on a dis-

2. As the Court of Appeals noted, "national film rental" does not actually reflect a film's earning power in any given area, but absent any other evidence, it may be regarded as "some indication" of earning power (5a).

3. The average quality of Viking's films also *exceeded* that of the only other first-run theatres operated by respondent exhibitors, comparable in size to Viking—the Stanton and the Goldman (31a; R. 895-96; R. 850-57). The remaining theatres of respondent exhibitors are between two and four times larger than Viking (31a).

tributor to deal exclusively or preferentially with any exhibitor (11a-12a; R. 112-13).

The existence of splits between exhibitors Goldman and Stanley Warner in no respect denied any other exhibitor the opportunity to license every picture released in Philadelphia (12a-13a). Each film was offered to all of the exhibitors; the only effect of the splits was that Stanley Warner and Goldman rarely bid for the same picture (12a-13a). Indeed, the Viking, Trans-Lux, Arcadia, Studio and World Theatres *entered* the first-run Philadelphia market *after* splits were in effect between Goldman and Stanley Warner. MGM pictures were subject to a split agreement between Goldman and Stanley Warner (11a); yet in its first year Viking licensed nine out of ten MGM films for which it submitted offers (10a). United Artists' films were subject to a split (11a); yet Viking licensed 11 of the 17 United Artists' pictures it sought (10a). As the Court of Appeals concluded from its careful analysis of the record:

> "The evidence affirmatively shows that every exhibitor was afforded the opportunity to bid or negotiate for the pictures of each distributor; in fact, many of the pictures listed on the split were licensed to non-defendant first-run theatres, including the plaintiff." (12a)

The split participants not only faced competition but also, like every other exhibitor, had to offer terms satisfactory to the distributor to secure first-run product (R. 103, 1816). They were not assured of any films by virtue of a split; and they were often unsuccessful in obtaining pictures which were split. Of the split pictures in which Viking was interested, it actually licensed more than did either Stanley Warner or Goldman.[4] Indeed, Viking appar-

4. 48 of the 87 pictures in which Viking evidenced any interest were on "splits". Of those 48, Stanley Warner's three theatres got a total of 12, Goldman's three theatres got a total of 14, Viking got *17*, and 5 went to the Arcadia and Trans-Lux (R. 1620-25; Ex. Pl. R. 2355-81).

ently recognized its own competitive advantage in being free to seek one hundred percent of the distributors' product, while the split removed Stanley Warner or Goldman as Viking's competitor for certain pictures; Viking never asked to participate in splits and, when invited to participate, refused (R. 1924). As the Court of Appeals found:

> "There is no evidence that any exhibitor requesting participation in the split of product would have been excluded." (13a)

In the foregoing discussion, we have made no reference to petitioner's contention that "a separate understanding" (Petition, p. 6) existed between Stanley Warner and Goldman, on the one hand, and Fox Philadelphia, on the other, whereby Fox Philadelphia would seek exclusively Twentieth Century-Fox pictures and, in return, Stanley Warner and Goldman would not bid for Twentieth Century-Fox pictures (Petition, p. 7). Of course, the principles set forth above respecting the Stanley Warner-Goldman splits would be equally applicable to such a split involving Fox Philadelphia, had it existed. Nothing, however, is plainer in this record than the fact that no such split existed. Petitioner's own reference to the record—the testimony of Simon Fabian, President of Stanley Warner Management Corporation—is that there was no such split (R. 87-89).[5] Other Stanley Warner employees testified to the same effect (R. 126, 1619, 1626). Mr. Goldman himself testified that neither Fox Philadelphia nor Twentieth Century-Fox was ever a party to any split (R. 1743). These were the parties who would know and who did know about the splits. There was no testimony to the contrary and the only conclusion that can be drawn from this testimony is that Fox Philadelphia and Twentieth Century-Fox, in fact, were not parties to any split of product in Philadelphia.

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5. Other testimony of Mr. Fabian also contradicts petitioner's unsupported assertion (R. 115-16).

The Court of Appeals, moreover, specifically held that Twentieth Century-Fox was not a party to the split. It said:

> "The evidence in this case shows that the product of TWENTIETH CENTURY was available to all exhibitors and was licensed on the basis of open competitive bidding." (10a)
>
> • • •
>
> "The pictures of TWENTIETH CENTURY were not split between STANLEY WARNER and GOLDMAN. They were customarily exhibited by Fox." (12a, footnote 8)
>
> • • •
>
> "The product of TWENTIETH CENTURY was licensed picture by picture on a competitive bidding basis, except where no bids were submitted. Its product was not split between STANLEY WARNER and GOLDMAN, and was apparently made available to all interested exhibitors." (15a)

Petitioner, as a matter of fact, licensed eight of the fifteen Twentieth Century-Fox pictures in which it was interested (11a).

Argument.

In an attempt to induce this Court to review an anti-trust case where thoughtful and reflective analysis of the record convinced all judges below that there was a total lack of proof either of deprivation of product or conspiracy, petitioner here abandons the theory on which its case was presented in the trial and appellate courts, and substitutes for the record facts a maze of hypothetical statistics never before urged in either court. Petitioner shifts its position to the theory that splits are illegal *per se*, a theory which it flatly disavowed in pre-trial proceedings (R. 30). The Fourth Pre-Trial Order, filed February 26, 1960, reads in part:

> "* * * It is understood that the allegation that the above splits were illegal per se is presently to be treated as abandoned and no longer an issue in the case" (R. 30).

Viking tried its case on the theory that it was deprived of product by the unfair rejection of allegedly superior bids, and subjected to various other discriminations (2a-3a).[6] The great bulk of the record is devoted to Viking's claim that its bids were improperly rejected, which Viking contended *proved* conspiracy—a contention which the Court of Appeals analyzed in detail and rejected (17a-21a). Petitioner's evidence in support of this contention having failed as *proof* of conspiracy, petitioner now resubmits that evidence in this Court as "merely illustrative" of the "effect" of splits (Petition p. 27). Petitioner has departed from its trial theory and from the facts in the record, and, unable to meet the analysis of the Court of Appeals, simply ignores it.

6. Far from suggesting that splits *established* anticompetitive effects, Viking's trial counsel conceded that evidence of splits did *not* show that Viking received discriminatory treatment from the distributors (R. 107)—a fact which the record conclusively confirms.

Represented by distinguished counsel throughout, petitioner had each of its claims considered by an appellate tribunal long experienced in motion picture antitrust litigation (see 28a, footnote 14)—a Court which received three briefs from petitioner, devoted a full day to oral argument, made a long and thoughtful analysis of a 7000-page trial record, and reached a unanimous result. There is no unique legal question involved, and no factual issue, warranting this Court's review of a private controversy and contentions held by four judges to be meritless.

We turn to the three reasons asserted in the Petition (pp. 21-32) in support of the application for certiorari.

I.

NO SUBSTANTIVE ISSUE ASSERTED BY PETITIONER WARRANTS THIS COURT'S REVIEW.

Petitioner's claim of substantive error centers on its contention that the splits of some pictures between Goldman and Stanley Warner in themselves gave Viking a claim to treble damages. In support of this contention, petitioner asserts a conflict between the decision below and the decisions of this Court (Petition, pp. 22-24). As we shall demonstrate (p. 16, *infra*), the cited decisions are inapplicable because not a shred of evidence in this record supports a rational inference that petitioner was adversely affected by the splits. Not only was Viking supplied with first-run films throughout the entire period in suit (pp. 4, 6-7, *supra*), but Viking consistently licensed the very pictures which had been split.[7] Petitioner does not even suggest to this Court that it ever lost a picture because of a split.

Conceding that no deprivation of product resulted from the splits, but aware that its case depends upon a showing of adverse impact, petitioner in this Court abandons the

7. While nearly half of the 87 pictures in which Viking evidenced an interest were not subject to *any* split, Viking's bids or offers were successful as to 17 of the 48 pictures it sought which *were* on a split (Exh. P-1, R. 2355-81, 1620-25).

record for an elaborate theory which lacks the slightest evidentiary basis, and then imagines—again without record support—the "economic effects" which might follow therefrom (Petition, pp. 10-12). Petitioner purports to show that Viking "had to pay" higher film rental for its films with a theory (derived from a mathematical manipulation of seating capacities and number of films played) that Viking was in the market less frequently than respondent exhibitors and therefore faced competitive offers more frequently (Petition, p. 11).

Petitioner's economic theory faces an insurmountable obstacle: the facts in this record.

(1) In hypothesizing that respondent exhibitors only met competitive offers when Viking was seeking a picture, petitioner ignores the Arcadia, Trans-Lux, World and Studio Theatres—all of which competed for and licensed first-run films (9a, 31a).

(2) The postulate (Petition, p. 11) that Viking "had to pay" higher prices or *any* given price is squarely refuted by the evidence. As the Court of Appeals specifically found, the record contains "no evidence" from which to infer that Viking was "required" to offer excessive terms for pictures; Viking's terms were "voluntarily proposed" (25a).

Viking's "high" film rental offers were in part a response to the same market conditions which caused its competitors to make "high" offers (judged in retrospect), and in part were simply the result of Viking's conceded errors of business judgment. Viking's manager repeatedly admitted at the trial that he made many mistakes in estimating a picture's box-office potential (R. 361-62, 397, 1304). For example, Viking's manager conceded that he made a serious mistake in offering $106,500 for MAN IN THE GREY FLANNEL SUIT, which he viewed as a potential hit but which proved a box-office failure (R. 303-4; 362).[8] This admitted mistake

8. Significantly, however, if Vikings' offer had been much lower, it would have lost the picture to the non-defendant Trans-Lux Theatre, which offered $100,000 (R. 467-8).

on this single film is responsible for much of Viking's present complaint that it "had to pay" excessive film rentals. Obviously splits had nothing to do with Viking's mistake in bidding for MAN IN THE GREY FLANNEL SUIT. This one error accounts for over 9% of Viking's total film rental during the period in suit (R. 2067, 2647).

(3) Petitioner's theory that Goldman and Stanley Warner *could* "conserve resources" while Viking was out of the market to "bid up" films when Viking was competing —supposedly forcing artificially inflated terms on Viking— lacks the slightest evidentiary basis. The Court of Appeals exploded petitioner's contention with this finding:

> "There is no evidence in this record from which it may be inferred that any artificiality of price structure existed; in fact, plaintiff made no attempt to offer such evidence." (14a)

Not only is petitioner's theory constructed on hypotheses rebutted by record evidence, but the "economic effects" which petitioner derives from its theoretical approach are based on patently fallacious reasoning.

Thus petitioner, attempting to show that Viking's film rental exceeded that of the respondent exhibitors, presents a chart comparing the percentage of its gross receipts paid in film rental with the percentage paid by three theatres selected by petitioner, the Goldman, Midtown and Stanton (Petition, p. 12). Petitioner's bare figures fail to take into account (1) the fact that film rentals reflect the business acumen of exhibitors in making offers which correctly anticipate box-office receipts (Viking's offers admittedly reflect bad judgment, R. 361-2, 397, 1304); (2) the fact that some theatres, unlike Viking, followed a policy of consistently seeking cheaper, inferior films (the Goldman and Stanton Theatres, two of the three selected in petitioner's chart, operated on a policy of exhibiting such films, R. 857, 873-5); and (3) the variance in grossing potential among theatres (the Midtown Theatre, also selected in petitioner's

chart, was a better grossing house than Viking—even though of comparable size, R. 2067). Indeed, Viking's selection of these three theatres is itself misleading, since the Randolph Theatre, operated by respondent Goldman, and omitted from petitioner's chart, paid 48% of its gross receipts in film rental—approximately equivalent to Viking's own percentage (R. 2067). Obviously, bare and selective figures as to percentage of receipts paid in film rental prove nothing more than the inevitable variance in film rental paid by different theatres for different pictures, and certainly do not support petitioner's bald assertion that its film rentals were the "economic effects" of splits.

Similarly, petitioner's other assertions of "economic effects" supposedly flowing from splits—*i.e.*, that Viking played fewer pictures, that it played poor quality films, that it did not receive adjustments (assertions in themselves erroneous in fact and rejected by the Court of Appeals, 21a-24a) have no connection with splits either in fact or in logic, and petitioner does not suggest even a theoretical basis for such connection.

Petitioner's preference for speculation and theory is understandable, because the facts in this record—facts carefully reviewed by two courts below—destroy any claim that petitioner suffered adverse impact as a result of the splits.

Petitioner's contention that splits in the licensing of motion pictures are *per se* illegal presents no issue warranting this Court's review, especially in a case where the absence of injurious impact was overwhelmingly demonstrated. There is no conflict in the Courts of Appeals on this issue: in the only other Court of Appeals decision where the legality of splits was at issue, the First Circuit, on reviewing the trial record, declined to find any violation. *Brown v. Western Massachusetts Theatres, Inc.*, 288 F. 2d 302 (1st Cir. 1961). And as the Petition itself indicates (p. 25), the Antitrust Division of the Department of Justice, charged with enforcement of the decrees entered in *United States v. Paramount Pictures Inc.*, 334 U. S. 131

(1948), against the film distributors, *requested* in 1960 and again in 1961 that the distributors consent to splits in Texas markets. Obviously the Department considered splits a reasonable and proper practice in the motion picture industry under the *Paramount* decree and *a fortiori* did not deem splits *per se* illegal.

Urging an analogy between splits and the division by sellers of markets and territories condemned in this Court's decisions (Petition, pp. 22-24), petitioner misconceives the very nature of the splits in this case. As the Court of Appeals expressly found, "each exhibitor was at all times afforded the opportunity to license the pictures of each distributor notwithstanding the split" (13a). In the division-of-market cases, such divisions *prima facie* destroyed competitive forces in each of the divided areas, foreclosing buyers from a choice of *competing* products. No foreclosure from any part of the market or from any competitive opportunity resulted from the splits in Philadelphia, and no adverse impact upon the Viking Theatre was shown.[9]

Splits aside, the Petition revives several alleged claims of discriminatory treatment, all of which were fully presented in the courts below and thoroughly considered and rejected in the Court of Appeals' opinion. The so-called "Schwalberg Agreement," which involved negotiations by one distributor—Paramount—with two of the respondent exhibitors (Petition, pp. 7-9; 13-14), was carefully analyzed by the Court of Appeals (14a-17a). After painstaking dissection of the evidence, which involved no wrongdoing of any kind, the Court concluded that no distributor other than Paramount "either knew of, acquiesced in, or adhered to" any such agreement (17a), and that any such agreement by a single distributor, "refuted by most of the evidence"

9. Indeed, petitioner established no damage at all. The trial court so held (R. 2350-51), but the issue was not passed upon by the Court of Appeals in view of its finding that no antitrust violation had been established (29a).

but accepted for the purposes of argument (13a), did not evidence conspiracy (14a). Here, again, Viking utterly failed to show adverse impact.

Finally, petitioner asserts that the Court below disregarded this Court's admonition that in antitrust actions, the character and effect of an alleged conspiracy should be viewed as a whole. *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U. S. 690, 698-9 (1962). But the Court of Appeals concluded its detailed discussion of the evidence by specifically affirming its obligation to view the evidence "as an integrated whole and as it relates to the general allegation of conspiracy" (27a).[10] Petitioner's case had a plenary appellate review in complete accord with this Court's precepts governing antitrust liability. No basis exists for the exercise of this Court's certiorari jurisdiction.

II.

NO EVIDENTIARY ISSUE ASSERTED BY PETITIONER WARRANTS THIS COURT'S REVIEW.

Having consumed ten weeks of trial and thousands of pages of testimony presenting evidence of every relevant aspect of the transactions involving the 87 pictures in which it showed an interest during the 28-month period in suit, petitioner challenges the trial court's exclusion of "evidence of the respondents' activities with regard to the 381 films which Viking did not seek to license" (Petition, p. 28). Even though evidence respecting the award of every picture Viking ever attempted to license was held not to have established conspiracy, petitioner claims that it might have proved conspiracy to injure Viking from evidence of 381 transactions with which Viking had no connection whatsoever.

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10. The instant case is vastly different from *Continental Ore*, where plaintiff was eliminated from the vanadium business because of its inability to obtain product from the defendants. Here plaintiff's business suffered no adverse impact.

Petitioner makes the astonishing charge that its evidentiary argument was "ignored" by respondents and by the Court of Appeals (Petition, p. 30). Far from ignoring a point thoroughly briefed by *both* sides, the Court of Appeals in fact considered each of Viking's offers of proof at the relevant point in its detailed discussion of the evidence *as if the proffered evidence had been admitted* (28a). The court affirmed the trial court's evidentiary rulings not on the basis of any broad evidentiary principle, but simply because the excluded evidence "could have added little significance to that already in the record" (29a).[11]

In Hydra-headed antitrust conspiracy trials where the potential evidentiary range is practically unlimited, trial judges must be afforded a sound discretion to hold the evidence within rational bounds. *Committee Report on Procedure in Antitrust and Other Protracted Cases,* 13 F. R. D. 62, 66. This case involved no over-all exclusionary ruling rigidly adhered to throughout the trial, as petitioner asserts; indeed, many of the evidentiary rulings now complained of were based not on the criterion of Viking's interest in a picture, but on the inherent lack of probative value in the offered proof.[12] The trial court's evidentiary rulings

11. Petitioner points out (p. 28) that the figures used in the construction of its various theoretical hypotheses derive from offers of proof which were excluded at the trial. But these very offers of proof were *not* excluded from the Court of Appeals' appraisal of petitioner's evidence (28a).

12. For example, Viking offered to prove the *total* of the national film rentals of *all* pictures it exhibited during the period in suit, and similar *totals* for theatres operated by respondent exhibitors, in order to show that Viking received fewer quality films. The offer was rejected as having no probative value (R. 1053-54). Such totals—which would indiscriminately equate one outstanding picture played for a long run with a great number of inferior films played for short periods, are obviously meaningless as an indication of quality (R. 1124-26). Significantly, Viking declined to compare the *average* national film rental of the pictures played at each theatre because Viking's *average* national film rental was higher than that of three of the respondent's theatres (R. 41-56, 894-5, 851-8).

reflect a sound and flexible approach to the practical problem of exposing a jury of laymen to a massive barrage of facts, statistics, and economic argument over weeks and months of trial. The line must be drawn somewhere, and it was drawn in this case through a reasoned exercise of judicial discretion to control unlimited evidentiary excursions which would have prolonged an already interminably protracted case.

Petitioner's evidentiary point reduces to an attack on the trial court's discretion in excluding matter which, in any event, was fully evaluated by the Court of Appeals. No evidentiary principle is presented for review.

III.

THE INTERESTS OF ANTITRUST ENFORCEMENT DO NOT REQUIRE CERTIORARI IN THIS CASE.

Petitioner's final point (pp. 31-32)—that the granting of certiorari here will encourage antitrust enforcement by private litigants, with a resulting decrease in the volume of Government actions coming to this Court by direct appeal—requires no comment. We merely note that the final anomaly in the Petition is the suggestion (Petition, p. 31) that the granting of certiorari in this case will contribute to "lightening the Court's burden".

CONCLUSION.

The Petition for a writ of certiorari should be denied.

Respectfully submitted,

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